UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CAPITOL RECORDS INC.; SONY BMG MUSIC ENTERTAINMENT; ARISTA RECORDS LLC; INTERSCOPE RECORDS; WARNER BROS. RECORDS INC.; and **UMG RECORDINGS INC.**, *Plaintiffs*, v. **JAMMIE THOMAS**, *Defendant*.	Case No. 06-cv-1497 (MJD/RLE) JURY DEMANDED

RESPONSE TO PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE TESTIMONY OF DEFENDANT'S EXPERT DR. YONGDAE KIM

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INTRODUCTION

Dr. Yongdae Kim ("Dr. Kim") is a renowned scholar from the University of Minnesota in Computer Science. *See* Ex. B to Plaintiffs' Motion. Specifically, Dr. Kim has conducted research and is an expert in peer-to-peer systems, network security, and wireless networks. *See id.*

Defendant has retained Dr. Kim to offer expert testimony in this case. In this case, Plaintiffs seek to show that Defendant committed copyright infringement by illegally sharing music files through peer-to-peer software called "KaZaA" via the Internet. *See generally* Plaintiffs' Complaint. Defendant contends that she is not responsible for downloading or using the KaZaA to share the songs at issue for infringement in this case. Plaintiffs seek to argue that the presence of KaZaA and the alleged infringing songs, by themselves, prove the Defendant committed illegal acts. Plaintiffs' expert will offer such testimony as well.

However, Dr. Kim will provide rebuttal expert testimony, *inter alia*, demonstrating that there are many other scenarios that can explain how the KaZaA software and the alleged infringing songs appeared on Defendant's computer. This testimony will be helpful to the jury because it will allow the jury to properly weigh the evidence regarding the origin of the KaZaA software and the alleged infringing songs. As demonstrated below, Plaintiffs' Motion fails to establish that Dr. Kim is not qualified to offer this reliable and relevant testimony that will assist the jury in resolving fact issues in this case.

I. DR. KIM'S REBUTTAL EXPERT TESTIMONY ON ALTERNATIVE EXPLANATIONS OF PLAINTIFFS' EVIDENCE IS RELIABLE AND ADMISSIBLE.

In Section I of their Motion, Plaintiffs correctly point out that Dr. Kim offers fourteen (14) alternative explanations for the presence of KaZaA and certain alleged infringing songs on Defendant's computer. Plaintiffs also correctly point out that Dr. Kim is not offering an opinion on the probable cause of the presence of KaZaA and certain alleged infringing files.

However, what Plaintiffs fail to recognize is that Dr. Kim is offering this testimony as rebuttal expert testimony to Plaintiffs' expert Dr. Jacobson. As such, and as stated in Dr. Kim's expert report (Ex. B to Plaintiffs' Motion), Dr. Kim is merely opining as to the reliability and weight of Dr. Jacobson's testimony as to Plaintiffs' evidence. Dr. Kim discusses multiple possibilities of alternative explanations that Dr. Jacobson did not consider in arriving at his conclusions. This is class rebuttal expert testimony. *See, e.g., Polski v. Quigley Corp.*, 538 F.3d 836 (8th Cir. 2008) (holding expert testimony may be challenged by, *inter alia*, "whether the proposed expert ruled out other alternative explanations"). Accordingly, Dr. Kim is offering rebuttal expert testimony to Dr. Jacobson's testimony by pointing out the many alternative explanations Dr. Jacobson failed to consider.

Moreover, Plaintiffs' claims that Dr. Kim's testimony is unreliable all sing the same refrain: Because Dr. Kim discusses possibilities and not probabilities his testimony is unreliable. Plaintiffs' arguments fail for several reasons. First, because Dr. Kim is a rebuttal expert, he is entitled to opine on alternative possibilities that Dr. Jacobson did not consider so that the jury may consider the full weight of Dr. Jacobson's testimony. Second, while Dr. Kim may opine as to possible explanations for the presence of certain data on Defendant's computer, the possibilities themselves are without question reliably arrived at. In other words, while it may be only a possibility that, for example, someone may have hi-jacked Defendant's internet account, there is no question as to whether internet hi-jacking an internet account could explain the presence of the KaZaA software and alleged infringing files on Defendant's computer. Plaintiffs cannot show that Dr. Kim's alternative explanations are, in and of themselves, unreliable as alternative explanations that should have been considered by Dr. Jacobson.

Finally, the three cases cited by Plaintiffs are in apposite. First, neither *Thomas*, *Warren,* or *Hall* concern rebuttal experts. Second, these cases all deal with situations where a party that has the burden of proof on an ultimate issue at trial offers primary expert testimony on the ultimate issue (i.e., causation in *Thomas*) in the form of possibilities as opposed to probabilities. This is not the case here. Dr. Kim is a rebuttal expert for the Defendant (who does not carry the burden of proof) and who is only offering opinions as to alternative explanations that were not considered by Plaintiffs' primary expert in support of Plaintiffs' case.

Accordingly, Section I of Plaintiffs' Motion fails to demonstrate Dr. Kim's rebuttal testimony should be excluded.

II. DR. KIM IS QUALIFIED TO OFFER EXPERT TESTIMONY ON THE KaZaA FILE SHARING PROGRAM AND/OR THE FastTrack SHARING NETWORK.

Incredibly, in Section II of their Motion, Plaintiffs then attack the qualifications of Dr. Kim to opine in this case. Plaintiffs claim that Dr. Kim is not qualified to opine in this case because he lacks sufficient "experience" with KaZaA or FastTrack.

Plaintiffs' argument on this point is ludicrous. First, an expert may be qualified to opine under Rule 702 by their experience OR their education. As Plaintiffs concede in Section II of their Motion, Dr. Kim's education and background in computer science cannot be questioned. This alone qualifies him to render an expert opinion in this case.

As for his experience with these software programs, as Dr. Kim has stated in his expert report, FastTrack, KaZaA and KaZaA Lite "presents a large unknown to the academic community" because there have been few studies done. *See* Plaintiffs' Motion at Ex. B. Thus, Dr. Kim's alleged "lack of experience" with these programs is a universal problem, it is not unique to Dr. Kim. It, therefore, cannot work to disqualify Dr. Kim from opining as an expert in this case. If this were the case, then Plaintiffs would have a monopoly on experts since it is only they (and thus their experts) that are obsessed with peer-to-peer file sharing programs and mass litigation associated with them from the RIAA.

Accordingly, Section II of Plaintiffs' Motion fails to disqualify Dr. Kim from opining as an expert.

III. PLAINTIFFS' RULE 403 OBJECTION SHOULD BE OVERRULED.

Finally, in Section III of their Motion, Plaintiffs argue that Dr. Kim's testimony should be excluded under Rule 403. Plaintiffs support this argument with the same arguments made in Sections I and II of their Motion. For the same reasons as discussed above, these arguments fail. Dr. Kim's testimony, based on his immense education and scholarship, is reliable and relevant to demonstrate and rebut the weaknesses in Plaintiffs' evidence and Plaintiffs' expert Dr. Jacobson and to corroborate Defendant's testimony that she was not responsible for placing the software or files on her computer.

Accordingly, Plaintiffs' Motion should be denied in its entirety.

Respectfully submitted,

/s/ K.A.D. Camara

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